

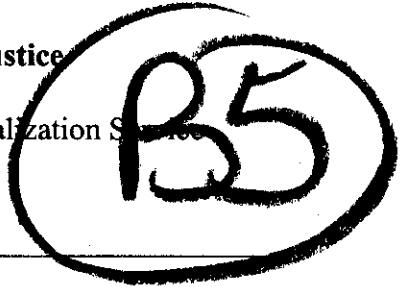
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U.S. Department of Justice

Immigration and Naturalization Service



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: Nebraska Service Center

Date:

JAN 17 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds two Master's degrees in chemistry (1995) and mathematics/computer science (1998) from Marquette University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term 'national interest.' Additionally, Congress did not provide a specific definition of 'in the national interest.' The Committee on the Judiciary merely noted in its report to the Senate that the committee had 'focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .' S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the 'prospective national benefit' [required of aliens seeking to qualify as 'exceptional.']. The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term 'prospective' is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Without explanation, the director concluded that the petitioner had not established that bioinformatics activities have intrinsic merit. We find, however, that the petitioner's project, government funded medical research at an accredited university, has intrinsic merit. In addition, we concur with the director that the proposed benefits of the petitioner's work, improved genetic understanding and treatment of diseases, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, note 6.

Dr. Howard Jacob, in whose laboratory the petitioner works at the Medical College of Wisconsin, explains that bioinformatics "combines the disciplines of mathematics, computer

science and biological insight.” Dr. Jacob asserts that genome research produces large quantities of complex genetic data that requires advanced methods of analysis and data management that permit ready access to the latest findings. Regarding the petitioner, Dr. Jacob states:

For my particular lab, [the petitioner] is such a vital member that he has developed our lab data management systems including databases and [a] data warehouse to meet specific local needs and to serve for [the] scientific community. These systems not only provide us with accurate and timely answers to interesting questions about genomic data, but also generate statistical and electronic reports so that I can easily overview the project progress and keep tracking the project status. Because the Rat Genome Project is a collaboration that includes several different Institutes, the data management systems he developed allow the user to perform the complex, multi-database queries through internet for old data review, new data update and data access that is impossible without this kind of system. He is also responsible for developing software to perform data-analysis, sequence analysis, map assembly and integration that manually are impossible. The important software [on which] he has been working is [a] rate map server and he already developed a web-based interface to create rate genome data linkage and make graphical maps for each chromosome. This kind of new information technology aids the understanding of fundamental molecular and genetic processes that control health and disease.

Dr. Anne Kwitek-Black, a senior research scientist at the Medical College of Wisconsin provides similar information, asserting that the petitioner developed RH framework maps for each rat chromosome that can be accessed by scientists worldwide on the Internet.

Dr. Peter Tonellato, the petitioner’s advisor at Marquette University, asserts that the petitioner’s background in chemistry, mathematics and computer science “makes him ideally suited as a first rate bioinformatics specialty” and asserts that those qualified to work in this field are in high demand. Dr. Tonellato concludes that the petitioner’s data management systems are important to laboratories performing genetic research.

Dr. Jian Jiang, a former postdoctoral researcher in Dr. Tonellato’s laboratory, provides similar information, adding that the petitioner’s system allowed faster, more accurate access to data. Dr. Jiang concludes that the petitioner’s knowledge of unrelated fields is rare and makes him an asset to bioinformatics research.

Dr. Hershel M. Safer, Associate Director of Bioinformatics at Genome Therapeutics Corporation, asserts that he met the petitioner while visiting the Medical College of Wisconsin. Dr. Safer concludes that the petitioner “is the kind of person whom I would like to hire but have trouble finding” based on his favorable impression of the petitioner’s presentation and the petitioner’s “strong cross disciplinary background.”

The petitioner submitted evidence that he is listed as an author on three biochemistry articles. None of these articles report on breakthroughs in the petitioner's field of bioinformatics. Rather, they focus on the genetic results analyzed through the use of bioinformatics.

In response to the director's request for additional documentation, counsel quotes the letters addressed above, lists the petitioner's educational and research experience, discusses the importance of the rat genome project, and asserts that the petitioner was given the responsibility to design and maintain the information systems for this project based on his "extraordinary abilities and innate talents."

The director noted that a unique set of skills is insufficient to establish eligibility for the waiver and concluded that the petitioner had not established that his contributions exceeded those of his peers or that a competent researcher in the field could not satisfactorily perform the same tasks.

On appeal, counsel notes that the petitioner's rat genome project receives funding from the National Institutes of Health and discusses the prestige of the NIH, which is not in question. Counsel then quotes the above letters and discusses the importance of the petitioner's project, his experience, and the reputation of his employer. The petitioner submits a new article published after the date of filing, downloaded information from Internet sites designed by the petitioner, and Dr. Jacob's grant application for a project to begin after the date of filing that does not include the petitioner under "key personnel," but as an analyst programmer under "personnel report." The letters supporting the grant proposal indicate that other rat genome Internet sites do exist, such as the NIAMS site maintained by the NIH and RATMAP.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record is supported mostly by letters from the petitioner's immediate circle of colleagues and articles reporting the results of research, as opposed to reporting breakthroughs in systems analysis and data management. While letters from collaborators are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's influence over the field as a whole. In addition, even if the petitioner had submitted evidence that his articles have been widely cited, which he did not, such evidence would only demonstrate that the results of the data the petitioner helped analyze were influential. While we do not deny the importance of having systems to analyze genetic data, that the resulting data is significant is not necessarily evidence that other systems designers, as opposed to other genetic researchers, consider the systems designed to manage the data significant.

In light of the above, we concur with the director that such evidence demonstrates only that the petitioner's combination of skills is useful and in demand. As noted by the director, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation*, *supra*, at 221. Our conclusion that the petitioner's abilities could be enumerated on a labor certification is supported

by the fact that the Medical College of Wisconsin subsequently filed a new petition on behalf of the petitioner based on a labor certification. The Service has approved that petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.